IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 167 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
ABDULGAFUR A. MISTRY - Opponent(s)

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Appearance :
MR. TANVISH U. BHATT for Applicant(s).
NONE for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 25/07/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Mr.S.N.Soparkar, learned Senior Counsel, who

was earlier representing the interest of the assessee, had informed on 24th July, 2006 that he would not be appearing in the matter. The assessee - Mr.Abdulgafur A. Mistry had acknowledged the fact that Mr.Soparkar would not be appearing and that the Court be requested to dispose of the matter in accordance with law.

The letter of Mr.Soparkar along with the letter of Mr.Abdulgafur Mistry - the assessee are placed on the records. We proceed to decide the matter.

2. At the instance of the Revenue, the following question has been referred by the Tribunal for our opinion:

> “Whether the Appellate Tribunal is right in law and on facts in directing the Income-tax Officer to tax the income of the estate in the hands of the assessee rather than to tax it in the hands of the beneficiaries or in the hands of the beneficiaries' father under section 64(1)(iii) of the Act?”

3. From the facts, it appears that the matter relates to Assessment Years 1982-83 and 1983-84

correspond to Samvat Year 2037 and 2038. The assessee is one AbdulGafur Mistry, an individual. He was a partner in a firm which carried on business in the name of M/s.Allaudin Pirbhai Mistry. The other partner in the said firm was Smt.Sakuranbibi, mother of the assessee. On 15th March, 1977, the said Sakuranbibi executed a will whereunder she bequeathed certain ornaments belonging to her in favour of three minor children of the assessee and one minor child of the assessee's brother - Sallaudin. All the four children, in fact, are grand children of Smt. Sakuranbibi. It was also observed and mentioned in the will that on the death of the said Sakuranbibi, those four minor children would be entitled to all movable properties belonging to her. The assessee's brother's wife – Smt. Zubedabibi was appointed as an executor of the will. Smt.Zubedabibi and the assessee's wife – Mehrunnisa were described as the guardians and trustees of the minor children. It was also mentioned in the will that 20% share belonging to Sakuranbibi in the said partnership would go to the children and the executor Smt.Zubedabibi would be entitled to join the partnership in place of the deceased. Accordingly, Smt.Zubedabibi joined the partnership. The will also mentioned that the profit income from the partnership would be divided in equal share and would be deposited in four different

accounts of each child. Smt.Zubedabibi accordingly went on doing so. In the matter of income-tax, when the matter came before the Assessing Officer, he held that as trust was created in favour of the minors, the assessee was answerable. The Income Tax Appellate Tribunal, after going through the provisions of the will, observed that the words, trustee, executor and guardian, have been used as synonyms and that they are loose expressions. It also observed that on the facts, it would be clear that no trust was created, but, in fact, Zubedabibi was asked to work as a trustee because trust or faith was reposed in her by the testator. The Tribunal also observed that on the facts and in the circumstances of the case, as a fact no trust was ever created. It, accordingly, decided the matter against the interest of the Revenue.

4. After going through the complete order passed by the Tribunal and also after hearing Mr.Tanvish U.Bhatt, learned Counsel for the Revenue, we are of the considered opinion that no trust was ever created by the testator under the will in dispute. We also hold that if the executor of the will was to join the partnership to represent the interest of the minors and was to deposit the business income in the separate account of each of the beneficiaries/minors, then, such executor would not

gain the capacity of a trustee and would only be an executor of the will. Under the circumstances, the Tribunal was absolutely justified in observing that the provisions of Explanation-2A of Section-64(1)(iii) of the Income Tax Act were not applicable. The Reference is answered against the Revenue and in favour of the assessee. The Reference stands disposed of accordingly. No costs.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

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